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Supreme Court of the United States

October Term, 1958

THE DELAWARE, LACKWANNA & WESTERN RAILROAD COMPANY,

Petitioner,

against

GLENN C. SIEGRIST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Your petitioner, the Delaware, Lackawanna & Western Railroad, respectfully prays that a writ of certiorari issue to review that part of the order in the United States Court of Appeals for the Second Circuit entered on February 18, 1959, which remanded the cause for a new trial rather than directed entry of judgment for defendant-petitioner.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, reported at 263 F. 2d 616, is annexed as an appendix. No opinion was rendered in the District Court.

Jurisdictional Statement

Petitioner seeks review of an order of the United States Court of Appeals entered February 18, 1959, which re-

versed a judgment of the United States District Court for the Western District of New York for plaintiff-respondent and remanded for a new trial. Review is sought of so much of said order as called for a new trial rather than dismissal of the complaint, on the ground that in so remanding, the Court of Appeals departed in principle from decisions of this Court, and further because the procedural question involved has not been, but should be, decided by this Court. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1254 (1).

Question Presented

Should the Court of Appeals have directed the dismissal of the complaint, rather than a new trial?

Statutes Involved

Federal Rules of Civil Procedure

Rule 49 (b) *General Verdict Accompanied by Answer to Interrogatories:* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or

may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

62 Stat. 963, 28 U. S. C. A. 2106.

Determination. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Statement of the Case

This is an action to recover for personal injuries commenced in the United States District Court for the Western District of New York. Plaintiff, Glenn C. Siegrist, sued his employer, the Delaware, Lackawanna and Western Railroad (hereinafter called the "Railroad") and the United States Steel Corporation. The trial Court dismissed the complaint as against United States Steel Corporation, and that defendant was not a party to the proceedings in the Court of Appeals and is not concerned in this petition.

The jurisdiction of the District Court was based on the Federal Employers Liability Act, 45 U. S. C. A. § 51, *et seq.* in so far as the action against the Railroad is concerned.

Plaintiff was employed by the Railroad as a car inspector in the westbound yard at Buffalo, New York. Inspectors

in the westbound yard have two types of duties; the primary duty is inspection of the running gear, journal boxes and undercarriage of trains coming into the yard from the east. When not so engaged, car inspectors "card" box-cars. This latter task involves classifying empty box-cars according to the type of commodity each is fit to carry. Both duties may be, and are performed from the footpath paralleling the tracks. No work whatever is done in the westbound yard which necessitates a car inspector ever entering into or upon any car (Railroad's Appendix: 25; 30; 44-45; 103-105; 114-116; 117-119; 132-133; 133-134; 140-143; 148-150; 150-153; 154; 158; 158-159; 160; 161-163; 168-169; 171).

On the night of December 19-20, 1951, Siegrist and his partner, Schultz, were working the 11:00 P. M. to 7:00 A. M. shift in the westbound yard. While awaiting the arrival of HB-9 from Hoboken, due at 1:40 A. M., they were engaged in "carding" box-cars on Track No. 1. There was no work whatever to be done with respect to any gondola car. There was snow on the ground (Railroad's Appendix: 26; 27; 46-47; 48).

After Siegrist and Schultz had proceeded past about 30 cars of the 75 standing on Track No. 1, the cars began to move, indicating that an engine had attached and a switching operation was getting underway. Thereupon, and in accordance with normal practice, Siegrist and Schultz discontinued their carding activities and were proceeding on foot to the west end of the yard to await the arrival of HB-9 (Railroad's Appendix: 33; 48-49; 67-68; 70-71).

Schultz, as both would have done in normal practice, continued walking along the footpath beside Track No. 1. Siegrist, on the other hand, saw a gondola car pass him

and decided to catch a ride. He testified that in so doing he had no idea whether he would end up closer or farther from his destination at the west end of the yard. He also testified that, at the instant he swung up onto the stirrup of the gondola, he was aware of a specific company rule directing employees to "keep off cars and engines except in performance of duty", and knew that he had no duties to perform on the gondola car (Railroad's Appendix: 31-33; 44; 50; 55; 58-59; 61; 62; 63-66; 72-73; 74-75; 76; 78; 154; 155-156; 169).

Finding the ladder on the car icy and slippery, Siegrist, instead of returning to the footpath, climbed into the gondola car. He made no effort to determine whether the car was loaded, although he testified that he knew it would be dangerous to enter the car if it were loaded, and although the uneven surface should have made obvious that the car was loaded. A simple examination with his hand or his lantern would have disclosed that the car contained a load of steel plates (Railroad's Appendix: 62-66; 37-38). Sometime later the train stopped and a "floating load" of steel plate moved forward, pinning Mr. Siegrist's leg and causing the injury complained of in this action.

There was no evidence at the trial that any car inspector ever rode in a car in the westbound yard, and consequently no evidence of notice or knowledge by the Railroad that car inspectors were entering upon cars in this yard. The plaintiff did not testify on this point (cf. Railroad's Appendix: 25-39; 41-83. Siegrist's Appendix: 2-21). The question was put to one Ayres, but an objection was sustained. (Ayres could only testify as to a period remote from the date of the accident and about a different yard.) (Railroad's Appendix: 40-41). Schultz denied ever having seen a car inspector riding a car in the westbound yard. He also de-

nied an alleged prior inconsistent statement. (Railroad's Appendix: 128-131. Siegrist's Appendix: 42-43).

Thus, after repeated efforts, plaintiff was unable to produce any evidence that the Railroad had notice that car inspectors were riding in the cars, and consequently there was nothing for the trial judge to submit to the jury on this point.

However, a special question was submitted to the jury in the following form:

> "Was Siegrist in the gondola car in the performance of his duties? (Jury's answer) No."

In spite of the special finding, the jury found the Railroad negligent, Siegrist 25% negligent, and brought in a verdict against the Railroad for $75,000 (Railroad's Appendix: 23).

The obvious inconsistency between the special finding and the general verdict may be explained by the failure of the trial Court properly to charge as to the duty of the Railroad to plaintiff. Under the charge as given, the jury could find for plaintiff without regard to whether or not the Railroad owed any duty to the plaintiff in the circumstances of the case. The Court of Appeals pointed out that a finding of a duty to plaintiff was necessary to support a verdict for him. Relying on the decision of this Court in *Ringhiser v. Chesapeake & Ohio Railroad Co.*, 354 U. S. 901 (1957), the Court of Appeals held that there could be a breach of duty to plaintiff only if (1) he was in the car in the performance of duty or (2) the Railroad had notice that he might be there. *The jury had disposed of the first possibility in favor of the Railroad, and no evidence had been introduced to support the second possibility.*

Consequently, the Court of Appeals reversed—but remanded for a new trial. Judge Swan dissented and voted to remand with directions to dismiss the complaint. His dissenting opinion is as follows:

> "Since the jury found that plaintiff was not in the gondola car in the performance of his duties, and since there was no evidence that the company rule had ever been violated before, I see no reason for the trial judge to have charged on the subject of notice to the company that an employee might be riding in the gondola. In my opinion plaintiff's (*sic*) motion to dismiss the complaint should have been granted."

The position of petitioner is that stated by Judge Swan. Plaintiff had a full opportunity to prove notice at the first trial and failed in his attempt although his counsel was fully apprised of the materiality of such proof. Consequently, no reason exists which would justify a retrial.

ARGUMENT

POINT I

This case raises the question of proper appellate procedure in reviewing cases in which special interrogatories have been used, and the answers returned are inconsistent with the general verdict.

As the Court of Appeals held, the duty of the Railroad to provide plaintiff-respondent with a safe place to work extends only to such places as he was required to be in the performance of duty and such other places as the Railroad had notice he might be.

Ringhiser v. Chesapeake & Ohio Railroad Co., 354 U. S. 901 (1957);

Atlantic Coast Line R. Co. v. Dixon, 189 F. 2d 525 (5th Cir., 1951).

Hence a finding by the jury of either

(1) that plaintiff was in the car in performance of duty *or*

(2) that the railroad had notice he might be there, was essential in support of the general verdict for plaintiff.

The issue of notice was excluded from the case by plaintiff's own failure to produce evidence to support any finding of notice. The trial Court could not properly charge the jury on this issue.

Wigmore; Evidence, § 2487.

An *affirmative* answer to the special interrogatory ("Was Siegrist in the gondola car in the performance of his duties?"), was, therefore, essential to support the general verdict for plaintiff—the negative response actually given by the jury was irreconcilably in conflict with the general verdict.

The trial Court did not realize that a conflict existed and consequently denied the motion to dismiss which the Railroad made after the verdict. Had the trial Court applied the law correctly, it would have realized that the answer to the special interrogatory and the general verdict were irreconcilable and would have been justified in dismissing the complaint under Rule 49 (b).

When the Court of Appeals corrected the error of law, it was presented with the task of disposing of the case as the trial Court should have done had it realized that a Rule 49 (b) situation was presented.

POINT II

The question of appellate review in cases in which special interrogatories conflict with a general verdict is of sufficient general importance to merit decision by this Court.

As this case well exemplifies, special interrogatories offer a potent means of correcting errors of law, as well as of testing the thought processes of jurors.

See the discussion by Judge Frank in:

Skidmore v. Baltimore & Ohio R. Co., 167 F. 2d 54 (2d Cir., 1948).

There will probably never be a remedy for prejudicial error during the course of a trial short of a *trial de novo*, with all its expense to the litigants and to the judicial system. However, an entirely different situation is presented where there is no prejudicial error during the trial, and a special interrogatory is answered by the jury on the decisive issue. In such a case, any error in applying the law to the facts may be corrected without the need for a new trial. The case is ripe for final disposition on the basis of the law, as corrected in the appellate Court, and the facts as found by the jury.

In the interests of justice and of the judicial system, all possible encouragement should be given by this Court to special interrogatories as a tool of appellate review. We have failed to find any case in which this Court has instructed the Courts of Appeal for the several circuits in their power and duty in special interrogatory cases.

While there seems no reason for doubting that the Courts of Appeal have the same powers as are accorded

the District Courts under Rule 49 (b), it would be desireable to settle the question.

Compare:

Wayne v. New York Life Ins. Co., 132 F. 2d 28 (8th Cir. 1942) (power of Court of Appeals to direct judgment exercised);

Theurer v. Holland Furnace Co., 124 F. 2d 494 (10th Cir. 1941) (power of Court of Appeals to direct judgment recognized);

Welch v. Bauer, 186 F. 2d 1002 (5th Cir., 1951) (only power is to order new trial).

It is submitted that, in the instant case at least, it is so apparent that plaintiff has had a full and fair opportunity to present his case, that sound principle requires entry of final judgment for defendant.

POINT III

Decisions of this Court establish in principle the duty of the Court of Appeals to direct dismissal of the Complaint rather than a new trial in this case.

As already noted, no decisions of the Court have been found precisely applicable to the procedural context of this case. However, several decisions indicate the desirability of terminating litigation through entry of final judgment by direction of the Court of Appeals, whenever justice permits.

In *Toledo Scale Company v. Computing Scale Company*, 261 U. S. 399 (1923), at page 425, Chief Justice Taft for a unanimous Court in affirming the denial of an application for a new trial based on newly discovered evidence, described the controlling principle as:

"* * * a most salutary rule of law which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to draw out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing. The apparent hardship of particular cases should not and can not weigh against the application of this sound principle. As Mr. Justice Story remarked in *Ocean Insurance Co. v. Fields*, 2 Story, 59; 18 Fed. Cas. 532, 'It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal.'"

The case at bar presents a parallel situation: Plaintiff-respondent has had a full and fair opportunity to prepare and present his case. It is certainly contrary to the policy described by Chief Justice Taft to drag out the litigation, giving plaintiff a second chance to prove, by whatever ingenious means, facts which do not exist as shown by plaintiff's failure of proof at the first trial.

Baltimore & Carolina Line v. Redman, 295 U. S. 654 (1935), indicates the predilection toward final judgment in the appellate Court. The procedure approved in that case, and now embodied in F. R. C. P. 50 (b), was designed specifically to permit the appellate Court to enter final judgment upon correction of an error of law which does not corrupt the entire record—failure to direct a verdict.

See also:

Montgomery Ward & Co. v. Duncan, 311 U. S. 243 (1940).

Assuming that, in the present case, a jury question was presented on the question of performance of duty, then the trial Court did not err in the first instance, in submitting the question to the jury and in refusing to direct a verdict for the Railroad. However, after the jury had returned

its verdict, the trial Court did err. It should have been apparent that the plaintiff-respondent was not entitled to prevail, and the trial Court should have entered judgment for defendant under Rule 49 (b).

If the appellate Court has power to direct dismissal where the trial Court should have done so in the Rule 50 (b) situation, so also should the appellate Court direct dismissal in the Rule 49 (b) situation.

United States v. Stamey, 48 F. 2d 150 (9th Cir. 1931);

Walker v. Southern Pacific Railroad Co., 165 U. S. 593 (1897);

Fort Scott v. Hickman, 112 U. S. 150 (1884).

Walker v. Southern Pacific, *supra*, while dealing with an act of a territorial legislature which authorized entry of judgment in accordance with the answers to special interrogatories, is equally applicable to the powers and duty of the federal Courts. Justice Brewer said, at page 598:

> "* * * When a general verdict is returned and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a specific fact? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the neces-

sity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon that single response from the jury."

In the present case it was the trial judge rather than the jury who misinterpreted the law and hence correction could not come before the appellate stage. But the error, once conceived, is as easily corrected in the one case as in the other, and the same principle dictates the entry of final judgment if the potential value of special interrogatories is to be realized.

In *Fort Scott v. Hickman, supra*, this Court held that it had power to direct a proper judgment in accordance with special findings made by the Circuit Court sitting without a jury. The Court said at pages 164-168:

> "It follows, from these considerations, that the conclusion of law made by the Circuit Court on the facts found was erroneous. Its special finding of facts is, under §649 of the Revised Statutes, equivalent to the special verdict of a jury. *Norris v. Jackson*, 9 Wall. 125; *Coppelin v. Insurance Co.*, 71 Wall. 461, 467; *Insurance Co. v. Folsom*, 18 Wall. 237, 249; *Retzer v. Wood*, 109 U. S. 185; and, as such special finding covers all the issues raised by the pleadings, this court has the power, under § 701 of the Revised Statutes, to direct such judgment to be entered as the special finding requires. In cases like the present one, the proper practice is to direct a judgment for the defendant, instead of awarding a new trial. *National Bank v. Insurance Co.*, 95 U. S. 673, 679; *Fairfield v. County of Gallatin*, 100 U. S. 47; *Wright v. Blakeslee*, 101 U. S. 174; *People's Bank v. National Bank*, 101 U. S. 181; *Warnock v. Davis*, 104 U. S. 775; *Lincoln v. French*, 105 U. S. 614; *Ottowa v. Carey*, 108 U. S. 110; *Kirkbride v. Lafayette Co.*, 108 U. S. 208; *Retzer v. Wood*, 109 U. S. 185; *Canada Southern Railroad Co. v. Gebhard*, 109 U. S. 527; *East St. Louis v. Zebley*, 110 U. S. 321. The trial being without error, if the finding is sufficient, the same judgment is to be given as would be given on a special verdict. Where the special finding embraces

only a part of the issues, as in *Ex parte French*, 91 U. S. 423, a different rule prevails."

In the present case, the answer to the special interrogatory, while it does not cover every controverted issue, is nevertheless dispositive of the entire case, unlike *Ex Parte French, supra*, where the facts found specially did not justify a judgment for either party. Cf. *Stewart v. Southern Railway Co.*, 315 U. S. 283 (1942).

The foregoing decisions of this Court establish the necessity of entry of final judgment by the Appellate Court in the absence of factors indicating that the first trial has not been fair.

The question then is whether there is anything in the case to overweigh the general rule in favor of final disposition. There were no errors found in the conduct of the trial, and indeed none were complained of by plaintiff-respondent. Hence the most frequent reason for granting a new trial was not present.

Was there anything else in the record to indicate that the plaintiff-respondent had not had a fair chance to prove his case?

Clearly, a full and fair trial had been had on the issue of Siegrist's presence in the car in performance of duty. Equally clearly, the jury had disposed of that issue in accordance with the weight of the evidence and plaintiff's own admissions.

On the only other issue—that of notice—plaintiff-respondent made repeated efforts to raise a jury question—and he failed—he could adduce no proof whatever.

Could the failure to raise an issue on this point stem from inadvertence? The history of the case rules out this

possibility. In *Ringhiser v. Chesapeake & Ohio Railroad Company*, 354 U. S. 901 (1957), the majority of the Court rested its reversal of a dismissal of the complaint squarely upon a finding that the Railroad had notice that employees continually entered the cars contrary to company rules. (The minority members of the Court thought that even the finding of notice would not justify a judgment for plaintiff.) Counsel for both sides in the case at bar had followed the *Ringhiser* litigation through the courts. The decisions of the District Court, the Court of Appeals and of this Court were known to plaintiff-respondent at the time of the trial of this case. Because of the great factual similarity of *Ringhiser* and the case at bar, both parties studied the *Ringhiser* case closely and were aware of its implications. It is difficult to imagine a more pointed admonition to plaintiff-respondent to prove notice if he could.

In summary, the posture of the case in the Court of Appeals was as Judge Swan conceived it: The answer to the special question made mandatory a final judgment in favor of petitioner. The trial was free from error, and no vital issue remained to be tried. Justice required a final judgment for defendant.

POINT IV

Conclusion

For the reasons stated, your petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this cause on February 18, 1959, and that said order be modified to provide for the dismissal of the complaint herein.

Respectfully submitted,

JOHN E. DICKINSON,
HUGH McM. RUSS,
STEPHEN H. KELLY.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 39—October Term, 1958.

(Argued October 24, 1958 Decided February 18, 1959.)

Docket No. 25094.

GLENN C. SIEGRIST,

Plaintiff-Respondent,

v.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Defendant-Appellant,

and

UNITED STATES STEEL CORPORATION,

Defendant.

Before: SWAN and MOORE, *Circuit Judges*, and KAUFMAN, *District Judge.*

Appeal by defendant, Delaware, Lackawanna & Western Railroad Company from a judgment in favor of plaintiff entered on a jury verdict in the United States District Court for the Western District of New York, Burke, *D.J.*, in an action for personal injuries brought under the Federal Employers' Liability Act, 45 U. S. C. A. 51 *et seq.*

Reversed and remanded for a new trial.

JOHN E. DRURY, Esq., Buffalo, N. Y. (Desmond and Drury, Buffalo, N. Y., on the brief), for Plaintiff-Respondent, Glenn C. Siegrist.

HUGH McM. RUSS, Esq., Buffalo, N. Y. (John L. Truscott, Esq., Hodgson, Russ, Andrews, Woods & Goodyear, in the brief), for Defendant-Appellant, Delaware, Lackawanna & Western Railroad Company.

MOORE, *Circuit Judge:*

Defendant (appellant), Delaware, Lackawanna & Western Railroad Company (referred to as "the railroad"), appeals from a judgment in favor of plaintiff in an action against the railroad and the United States Steel Corporation to recover for personal injuries sustained as a result of their alleged negligence. The action was brought against the railroad under the Federal Employers' Liability Act (F. E. L. A.), 45 U. S. C. A. 51 *et seq.* Judgment was entered against the railroad after trial before the court and a jury which found upon specific questions submitted by the court: (1) that the accident was caused in part by negligence of the railroad; (2) that plaintiff's negligence contributed to the accident; (3) that plaintiff's negligence contributed 25% to the accident, that damages were $100,000 and that the verdict against the railroad was $75,000; and (4) that plaintiff was not in the gondola car (where he was injured) in the performance of his duties. Judgment was directed in favor of the United States Steel Corporation upon the written answers of the jury to the special questions submitted by the court.

The restricted area of review in injury cases brought under the F. E. L. A. does not include a redetermination of the jury's findings on factual issues. However, it is

within the province of the appellate court to examine the record to ascertain whether the jury's determination was made upon adequate instructions as to the applicable principles of law.

Plaintiff on the night of December 20, 1951 was employed by defendant as a car inspector. His duties were two-fold. First, when a freight train arrived in the Buffalo yard he was to check the condition of the running gear, the journal boxes and brakes. To do this he had to walk along the side of the train inspecting each car. Second, when not so engaged he was to inspect empty box cars and classify them as to the commodities they were best suited to carry. He was not required to classify gondola or open cars. On this particular night plaintiff and a fellow employee named Schultz, while waiting for the arrival of a freight train, were engaged in car commodity classification. This work also required plaintiff to walk alongside the box cars being inspected. Engaged in this task, plaintiff was walking on one side of the cars, Schultz on the other. There was a substantial amount of snow on the ground. While this classification work was in progress the cars commenced to move because of a switching operation so that plaintiff and Schultz had to discontinue this work. Schultz continued on foot, but plaintiff, desirous to avoid walking through the snow, and to get a ride to his destination, swung up on to the stirrup of a moving gondola car. The stirrup was slippery so plaintiff then climbed into the car. He thought the car was empty and walked to the forward end, but near the end of the gondola he felt a step down indicating a difference in level. As he was standing in this depression at the end of the car he heard the clicking sound of cars taking up slack, a sign that the train was stopping. The train did come to an abrupt stop caus-

ing steel plates loaded in the car to shift forward and pin plaintiff's right leg between the plates and the end of the car.

Plaintiff sued the railroad for negligence under the provisions of the F. E. L. A. and the United States Steel Corporation for negligence in that he was struck and his leg injured by a shifting load on a train.

A railroad is under a duty to use due care to provide its employees with a safe place in which to work. The area in which plaintiff was required to work was on the paths alongside the tracks from which he could perform his inspection duties. The accident, however, did not occur in this area. No part of his duties called for his being in a gondola car at any time or to hitch rides on moving cars. In fact plaintiff admitted that he was familiar with the railroad's rule which reads "Keep off cars and engines except in performance of duty."

In enacting the F. E. L. A. Congress did not provide that a railroad should be liable in damages for any injury suffered by an employee but only for those injuries resulting in whole or in part from its negligence. Congress did not define "negligence" for purposes of the Act. In *Urie v. Thompson*, 337 U. S. 163 (1949), the court, said, speaking of 45 U. S. C. A. 51 which governs this case:

> "The section does not define negligence, leaving that question to be determined, as the Missouri Supreme Court said, 'by the common law principles as established and applied in the federal courts.' 352 Mo. at 218, *Erie R. Co. v. Tompkins*, 304 U. S. 64, has no application. * * * Federal decisional law formulating and applying the concept governs * * * " (p. 174).

The principle, however, merely confines this court to Federal, as opposed to New York, law in construing the

term. As the Supreme Court said in a later case, *Morissette v. United States*, 342 U. S. 246 (1952):

> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them" (p. 263).

Negligence, however, implies a duty. The duty was to provide a safe place to work. There is no evidence that plaintiff's work area was in any way unsafe. To bring this area into the field for which the railroad might be responsible requires an extension of the area into the gondola car in which the injury occurred. Therefore to extend plaintiff's work area into the gondola car the jury under appropriate instructions addressed specifically to this point must determine that the railroad had notice or should have had notice that employees such as plaintiff used moving cars as a means of locomotion from one part of the freight yard to another thus enlarging plaintiff's work area to the interior of the gondola. The doctrine of notice, was especially emphasized by the Supreme Court in *Ringhiser v. Chesapeake & Ohio Railway Co.*, 354 U. S. 901 (1957), in which the majority said that there was evidence "that to respondent's knowledge employees used gondola cars for the purpose." This essential ingredient was further stressed by the comment that "there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a

likelihood that the petitioner would suffer just such an injury as he did."

The verdict here, however, does not rest upon such a charge. The trial court charged that the railroad owed a duty to conduct its operations including the switching of its trains and the carrying of freight in a manner reasonably safe under all the circumstances of the case. But one of the vital circumstances was knowledge that plaintiff might be in the car. The mere abrupt stop or the shifting of the steel absent plaintiff would not have given rise to liability any more than the presence of a large or loose stone on a roadbed footpath would have done so. It was the fact that the loose stone was in a work area which the plaintiff had to traverse in connection with his duties so that he was likely to step on it which created the liability in *Gibson v. Thompson*, 355 U. S. 18 (1957). See also, *Ferguson v. St. Louis-S. F. R. Co.*, 356 U. S. 41 (1958).

The trial court also charged that the railroad had a duty to inspect freight shipments to see that they were properly loaded and related this duty to that of providing its employees with a safe place to work. The misconception that such a charge might well have created in the minds of the jury was that the gondola car was an area in which the railroad knew that plaintiff might be. In short, the error was in the failure to charge that the jury must first determine whether there were any facts from which the railroad should have known or be presumed to have known that the moving gondola car was a place in which plaintiff might be riding. Had the jury made such a fact finding in plaintiff's favor then but only then would the gondola car have been brought within the safe work area rule. The jury actually found that plaintiff was not in the gondola car in the performance of his duties. Had the jury also found

that the railroad was not on notice, actually or constructively, that an employee might be riding in a car the verdict upon a charge containing this element might well have been different.

Nor was the notice requirement merged into contributory negligence by plaintiff's willful violation of the "Keep off cars * * *" rule. Such a violation could be considered in determining contributory negligence but first the jury had to reach a conclusion as to liability under applicable principles of law.

The judgment against defendant Delaware, Lackawanna & Western Railroad Company should be reversed and the case remanded for a new trial.

SWAN, *Circuit Judge* (dissenting):

Since the jury found that plaintiff was not in the gondola car in the performance of his duties, and since there was no evidence that the company rule had ever been violated before, I see no reason for the trial judge to have charged on the subject of notice to the company that an employee might be riding in the gondola. In my opinion plaintiff's (*sic.*) motion to dismiss the complaint should have been granted.